corrected order per order filed 11/21/13

IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL ANTONIO MARIANO A/K/A ANTONIO MIGUEL MARIANO A/K/A ANTONIO MARIANO MIGUEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57859

FILED

OCT 31 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

~~ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING~~

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, coercion, sexual assault, attempted sexual assault, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Lilia Cruz accused appellant Miguel Antonio Mariano of sexual assault. Mariano contended that Lilia fabricated the charge because she was angry with him and wanted him deported. After an eight-day trial, the jury found Mariano guilty on all counts but declined to impose a deadly weapon enhancement. Mariano now appeals.

The district court did not abuse its discretion in prohibiting Mariano from cross-examining Lilia about her immigration status

Mariano argues that the district court violated his rights of confrontation, cross-examination, and due process when it prohibited him from cross-examining Lilia regarding her bias, immigration status, and knowledge of the U-Visa program. The district court retains wide discretion to place "reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or [repetitive] interrogation." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). This discretion is narrowed when the purpose of

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cross-examination is to show bias. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 619, 137 P.3d 1137, 1145-46 (2006). However, the district court may still restrict such cross-examination where inquiries are "repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy[,] or humiliate the witness." *Id.* (internal quotations omitted).

We conclude that the district court did not abuse its discretion by limiting Mariano's cross-examination of Lilia regarding her bias, the U-Visa program, and her immigration status because such topics were irrelevant and speculative. Mariano presented evidence regarding the U-Visa program, but the mere existence of the U-Visa program is insufficient to establish that Mariano's intended cross-examination topics were relevant. Mariano made no showing that Lilia knew about the U-Visa program or lied about Mariano's sexual assault in order to seek its protections. There is no evidence that Lilia intended to apply for protection under the U-Visa program. Further, cross-examination on these issues for the first time in the middle of trial would have been prejudicial to both parties, especially when Mariano originally requested a mistrial after the State suggested it might seek to introduce Lilia's immigration status.[1]

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[1]Mariano also argues that the district court should not have permitted the State to introduce Lilia's prior consistent statements (from her voluntary statement to police) under NRS 51.035 because they were hearsay without an exception. We agree. NRS 51.035 requires that the prior consistent statement be made prior to when the supposed motive to falsify arose. *Patterson v. State*, 111 Nev. 1525, 1533, 907 P.2d 984, 989 (1995). As Mariano's theory of defense was that Lilia had motive to fabricate her charge from the moment she called police, her statements do not qualify under NRS 51.035 and are therefore hearsay without an exception.

The district court did not err in concluding that Mariano knowingly and voluntarily waived his Miranda rights

Mariano argues that the district court should have suppressed incriminating statements he made to a detective during a voluntary interview conducted in Spanish because he did not speak Spanish very well and could not have voluntarily waived his *Miranda* rights. When determining whether a valid waiver of a defendant's *Miranda* rights occurred, "[t]he inquiry as to whether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error. However, the question of whether a waiver is voluntary is a mixed question of fact and law that is properly reviewed de novo." *Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006) (footnote omitted). Statements deemed involuntary cannot be introduced at trial. *Passama v. State*, 103 Nev. 212, 213-14, 735 P.2d 321, 322-23 (1987). The state must show by a preponderance of the evidence that the defendant effected a knowing, voluntary, and intelligent waiver of his or her Fifth Amendment rights. *Falcon v. State*, 110 Nev. 530, 533-34, 874 P.2d 772, 774-75 (1994). This totality of the circumstances analysis considers a number of factors, including the length and continuity of interrogation, the use of physical punishment, the youth of the defendant, and his or her education level. *Passama*, 103 Nev. at 214, 735 P.2d at 323.

We conclude that Mariano understood Spanish sufficiently to participate in the interview and that he made a knowing, voluntary, and intelligent waiver of his *Miranda* rights. *See Mendoza*, 122 Nev. at 276-77, 130 P.3d at 181 (waiver of *Miranda* rights was inferred when detective read defendant his rights in Spanish and defendant did not express comprehension difficulties or a desire not to speak). The detective was fluent in Spanish and Mariano gave detailed, narrative answers to the

detective's questions.[2] Therefore, the district court did not err in concluding that Mariano made a knowing and voluntary waiver at the beginning of the interrogation. As a result, the statements from the beginning of the interrogation until the statement in which Mariano claims he requested an attorney were properly admitted. However, the second issue here is whether Mariano invoked his right to counsel during questioning.

The district court did not make a sufficient factual determination whether Mariano invoked his right to counsel

We review "'the district court's factual finding concerning the words a defendant used to invoke the right to counsel' for clear error, and '[w]hether those words actually invoked the right to counsel' de novo." *Carter v. State*, 129 Nev. ___, ___, 299 P.3d 367, 370 (2013) (quoting *United States v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994)). Once a suspect invokes his right to counsel under *Miranda*, he "cannot be subject to further interrogation and all questioning must cease until counsel has been made available to him." *Id.*; *see Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In order to determine whether investigators must cease all questioning, a court must first "'determine whether the accused actually invoked his right to counsel.'" *Carter*, 129 Nev. at ___, 299 P.3d at 370

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[2]Likewise, we conclude that the district court did not abuse its discretion when it did not provide a Chinanteco interpreter for Mariano because he was fluent enough in Spanish to assist in his own defense and was able to understand the proceedings in a meaningful sense. *See Ton v. State*, 110 Nev. 970, 972, 878 P.2d 986, 987 (1994) (a district court's decision regarding the appointment of an interpreter is reviewed for abuse of discretion).

(quoting *Davis v. United States,* 512 U.S. 452, 458 (1994) (emphasis omitted)).

Mariano argues that he said "I need an attorney" during his voluntary interview, but the detective ignored him.[3] "A district court's determination of whether a defendant requested counsel prior to questioning will not be disturbed on appeal if supported by substantial evidence." *Harte v. State,* 116 Nev. 1054, 1065, 13 P.3d 420, 427-28 (2000). If police continue questioning in the absence of counsel, "the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil v. Wisconsin,* 501 U.S. 171, 177 (1991).

Under our recent decision in *Carter,* a court must determine whether the accused actually invoked his right to counsel by making a factual finding regarding "'the words a defendant used to invoke the right to counsel.'" 129 Nev. at ___, 299 P.3d at 370 (quoting *Ogbuehi,* 18 F.3d at 807). It appears from the record that the district court failed to make a determination as to what Mariano actually said. Instead, the district court denied Mariano's motion to suppress based on the rationale that even if Mariano said "I need an attorney," it was not made sufficiently "clear to the officer." However, we recently held that a defendant's question "[c]an I get an attorney?" was an unequivocal request for the

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[3]The statement in question reads: "I need (unintelligible) if you're blaming me of rape but I also (talking over each other)" on the Certified Court Interpreter's September 29, 2010 transcript. When Detective Lebario listened to the audiotape in court, he stated that Mariano "may have said abogado," the Spanish word for attorney.

assistance of counsel. *Carter*, 129 Nev. at ___, 299 P.3d at 371. We conclude that if Mariano stated "I need an attorney," that would similarly be an unambiguous and unequivocal request for counsel, requiring that all interrogation cease.

Therefore, given our recent clarification of this area of law in *Carter*, we must reverse the district court's judgment of conviction and remand this matter for further factual analysis in order for the district court to make a determination whether Mariano actually requested an attorney.[4] If the district court determines that Mariano said "I need an attorney" during questioning, then our decision in *Carter* indicates that this statement was an unequivocal request for counsel. If so, all statements made after this request for an attorney would then be presumed involuntary and therefore inadmissible as substantive evidence at trial.

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[4]Because Mariano's statement was essential in the case against him, we cannot say that its admission was harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt") (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). If Mariano's statement had been suppressed, the jury would not have considered his admission of digital penetration, his statement regarding standing in "the woman's" living room, his statement that "the woman" told him "[t]o go to the living room because the boy was there," and his note asking for forgiveness for what occurred on the night in question. We cannot say beyond a reasonable doubt that Mariano's statements did not contribute to his conviction.

The district court did not plainly err in assessing Mariano a fee for the Indigent Defense Fund

Mariano argues that the district court erred by imposing a $1,000 fee for the Indigent Defense Fund during sentencing without making any findings in support of that amount. While we conclude that the district court erred by failing to make findings on the record regarding Mariano's ability to pay, this error does not affect his substantial rights under plain error review. *See Saletta v. State*, 127 Nev. ___, ___, 254 P.3d 111, 114 (2011) (failure to object generally precludes appellate review, but under plain error review, this court looks at whether the error affected the defendant's substantial rights).

Accordingly, we

ORDER the judgment of the district court ~~AFFIRMED IN PART, REVERSED IN PART~~ REVERSED, and REMAND this matter to the district court for proceedings consistent with this order.[5]

Gibbons, J.

Douglas, J.

Saitta, J.

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[5]In view of this order, we need not address Mariano's remaining arguments.

cc: Hon. Jennifer P. Togliatti, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk